

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEN D. NYE,

Defendant.

2:05-CR-209 JCM (PAL)

Related Case 2:09-CV-2027 JCM (RJJ)

ORDER

Presently before the court is petitioner Allen D. Nye's motion to vacate pursuant to 28 U.S.C. section 2255. (Doc. # 139). The government filed a response in opposition, (doc. # 144), and petitioner replied, (doc. # 147).

The instant motion is petitioner's second request to vacate his sentence pursuant to 28 U.S.C. section 2255. The court denied petitioner's previous motion to vacate on January 13, 2012. (Doc. # 130). This court is unable to consider a petitioner's second motion for relief pursuant to section 2255 unless the motion has been certified by a panel of the appropriate United States court of appeals. *See* 28 U.S.C. 2255(h). As the instant motion has not been certified by the United States Court of Appeals for the Ninth Circuit, it will be denied.

The court declines to issue a certificate of appealability. The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. section 2253, which provides as follows:

...

...

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a [s]tate court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Under this section, the court may issue a certificate of appealability only when a movant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the movant must establish that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotations omitted).

The court finds that petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not find the court’s determination that petitioner is not entitled to relief under section 2255 debatable, wrong, or deserving of encouragement to proceed further. Therefore, the court declines to issue a certificate of appealability.

1 Accordingly,

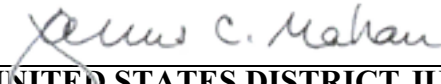
2 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that petitioner's motion to vacate
3 pursuant to 28 U.S.C. section 2255 (doc. # 139) be, and the same hereby is, DENIED.

4 IT IS FURTHER ORDERED that petitioner's motion to reply, (doc. # 147), and motion for
5 a stay, (doc. # 150), are DENIED as moot.

6 DATED August 8, 2014.

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UNITED STATES DISTRICT JUDGE

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